

June 21, 2010

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Cross-Industry Reply Comment on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278

Dear Ms. Dortch,

Attached are reply comments from twenty trade associations that represent thousands of American businesses that employ millions of American workers. These reply comments respond to issues raised by the Federal Communications Commission's proceeding concerning the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278.

If you have any questions concerning this filing, please contact me at 202-344-4613 or Michael Signorelli at 202-344-8050.

Sincerely,

/s/
Stu Ingis
Venable LLP

cc: Mark Stone
Colleen Heitkamp
Julie Saulnier

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act,)	FCC 10-18
Notice of Proposed Rulemaking)	

Reply Comments of

ACA International, Air Transport Association, Alliance of Nonprofit Mailers, Coalition of Higher Education Assistance Organizations, DBA International, Direct Marketing Association, Edison Electric Institute, Education Finance Council, Magazine Publishers of America, Mortgage Bankers Association, National Association of College and University Business Officers, National Association of Retail Collection Attorneys, National Association of Student Financial Aid Administrators, National Business Coalition on E-Commerce & Privacy, National Council of Higher Education Loan Programs, Inc., National Retail Federation, Newspaper Association of America, Student Loan Servicing Alliance, Student Loan Servicing Alliance Private Loan Committee, and U.S. Chamber of Commerce

The undersigned associations represent thousands of American businesses that employ millions of American workers. These associations' members include businesses of all sizes, operating across diverse industries, including financial institutions; college, universities, and student lenders; retailers; magazines; newspapers; marketers; utilities; and companies that recover unpaid debts for retailers, government agencies, and others. These member businesses regularly contact their customers to deliver a wide range of important communications. As wireless devices become more and more ubiquitous and as consumers expect frequent and timely information from companies with which they do business, these communications are increasingly made through autodialed and/or prerecorded message calls to wireless devices.

These associations are submitting this Reply Comment collectively to underscore the central issues many of them raised through individually filed comments in response to the Federal Communications Commission's ("FCC" or the "Commission") request for comment on its Notice of Proposed Rulemaking ("NPRM").¹ The Commission describes these changes as merely harmonizing its rules under the Telephone Consumer Protection Act ("TCPA") with the Federal Trade Commission's ("FTC") recent amendments to the Telemarketing Sales Rule ("TSR").² The Commission's proposal, however, would extend the TCPA's written consent requirements far beyond those of the TSR, which applies only to commercial sales calls.³ The FCC's proposal would impose a written consent requirement on all calls to wireless devices made using autodialers and prerecorded messages. This requirement would apply even to noncommercial, safety, and informational messages. Moreover, because the TCPA applies to text messages sent using autodialers—a position upheld by several courts around the country—this rule would also require written consent to send any text message, even one that is requested by a customer (*e.g.*, reporting an account balance or transaction).

This proposed requirement for prior written consent would have broad, negative implications across all of industry, adversely affecting consumers, business operations, and the economy. The proposed rule would harm the American economy and the consumers it is designed to protect, it is not required by the statute, and it does not harmonize the FCC's rules with the FTC's rules.

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 25 FCC Rcd. 1501 (Jan. 22, 2010).

² 75 Fed. Reg. 13471 (March 22, 2010).

³ 73 Fed. Reg. 51164 (August 29, 2008).

Accordingly, the associations oppose extending the written consent requirement to autodialed or prerecorded calls to wireless services. The associations ask the Commission to reaffirm its position that “prior express consent” obtained orally or in writing is sufficient to make autodialed and/or prerecorded non-marketing calls to wireless services.

A. The Commission’s proposal extends beyond harmonizing the rules with those of the Federal Trade Commission and is not legally required.

1. The Commission has proposed to require prior express consent to be made only in writing for all autodialed or prerecorded calls made to wireless devices regardless of the purpose of the call. This proposal, however, goes far beyond the TSR, which imposes written consent only on prerecorded calls that deliver a telemarketing message.⁴ Unlike the TSR, the Commission’s proposal would have a much broader effect, restricting the use of autodialers for all calls to wireless devices—and not just prerecorded messages—regardless of the content.

The FCC’s proposal, therefore, creates two unfortunate inconsistencies. First, under both the TSR and the proposed rule for prerecorded calls to residential lines, companies would be permitted to deliver non-marketing and information messages to customers without obtaining written consent (or even any consent). However, under the proposed rule, companies could not deliver *those same messages* to a consumer’s

⁴ *Id.* (stating that “the [Federal Trade] Commission has decided to adopt...an amendment making explicit a prohibition on prerecorded telemarketing calls without a consumer’s express written agreement to receive such calls.”).

wireless service without written consent (under the TCPA, express consent—not *written* express consent—is required for calls to wireless numbers).

Second, under the TSR, the need for express consent applies only to prerecorded messages (whether to a landline or a wireless number). The Commission’s proposal would apply to any call to a wireless device made using either a prerecorded message or an automatic dialer. This second category reaches virtually any call made by a business to a customer because of the broad construction the FCC and courts have given to the definition of an autodialer. Indeed, it will include essentially all text messages sent to customers (which are currently permitted under the TCPA with only with express—not written—consent).

2. The distinction created by the Commission’s proposed rule between noncommercial calls to residential lines and noncommercial calls to wireless lines is artificial because of the widespread use of cell phones as “residential numbers.” According to a 2009 survey, more than 24 percent of US households were “wireless only;” these households did not have a landline telephone.⁵ Approximately 52 million adults are “wireless-only.”⁶ 48.6 percent of adults aged 25-29 and 37.2 percent of adults aged 30-34 lived in households with only wireless telephones.⁷ Companies cannot easily distinguish between wireless numbers and residential lines, and would bear a substantial burden—developing a mechanism for screening or filtering wireless numbers—if

⁵ *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July – December 2009*, CDC, National Center for Health Statistics, Division of Health Interview Statistics, at 2 (rel. May 12, 2010) available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201005.pdf>.

⁶ *Id.* at 2.

⁷ *Id.* at 3.

required to determine the type of number provided by the consumer. Given the ubiquitous use of wireless services, a huge portion of Americans would be unreachable absent prior *written* consent, even though the consumer has previously provided his or her number and communicated a preference to be reached at a wireless number. Making it more difficult for businesses to reach their customers and account holders with important, non-marketing communications, such as fraud alerts and product recall notices, unduly harms consumers and businesses.

3. While the TCPA's requirement for express consent applies to *all* calls to wireless numbers made using an autodialer, the TCPA does not mandate that the Commission adopt a *written* consent requirement for such calls.⁸ If the Commission is relying on its discretion to add "written" to the requirement for "prior express consent," then it should exercise this same discretion to distinguish between marketing and non-marketing calls to wireless services. Non-marketing calls to wireless devices should be permitted with "prior express consent" including express oral consent

B. Written consent would unduly burden commerce without benefitting consumers.

1. At the time of the TCPA's passage, Congress stated that the law "directs the FCC to balance individual privacy rights, public safety interests, and commercial freedoms of speech and trade."⁹ Requiring express *written* consent for all calls to wireless devices, even those that are not "marketing" calls, does not strike a reasonable balance between these interests. Requiring written consent would significantly impair the ability of

⁸ 47 USC 227 (b)(1)(A).

⁹ S. Rept. 102-177, 102nd Congress (Oct. 8, 1991) at 6.

businesses to communicate important and valuable information that does not involve a telemarketing purpose to people who are existing customers. Currently, industry relies upon autodialers and prerecorded messages to deliver valuable information to consumers in a cost-effective and timely manner. The proposed restriction would restrain the ability of businesses to deliver critical information to consumers, thereby denying consumers access to this information.

2. While the TCPA requires “express consent,” there is a material distinction between this current requirement and the proposal for “express *written* consent.” It would be extremely difficult to acquire *written* consent for three key reasons:

- Given the use of wireless subscribers and “wireless-only” households (some 52 million adults), there is a huge cost associated with acquiring written consent from existing customers.
- It is impractical to assume that consumers who have already consented to receive calls through cellular services would bother to sign a written consent to receive calls they assume they should be getting anyway. This is particularly of concern with respect to debt collection calls.
- Even with respect to new or renewal customers, businesses have a legitimate interest in communicating with their customers concerning transactions and the provision of ongoing services.

As a result, the proposed rule imposes nearly insurmountable barriers to the transmission of non-marketing information. Thus, in balancing consumer and business interests, there

are huge costs associated with this proposal that will be borne by both groups: businesses will have increased difficulty transacting business with their customers, and customers will be disappointed to not receive information they expect to receive, or annoyed with having to sign a consent to receive such information.

3. The Commission cannot ignore the sweeping breadth and scope of the industries potentially affected and the extent to which autodialers are used across industries to call wireless numbers. The calls at issue here are for non-marketing purposes, intended to protect the well-being of consumers and the legitimate business interests of the caller and in some instances such communication may even be federally mandated. For example, the U.S. Department of Transportation is currently considering regulations that would require airlines to notify consumers “in a timely manner” about itinerary changes. Implementation of this mandate necessarily would entail the use of automated calls or text messages to wireless devices to update passengers regarding the status of their flights.¹⁰

Companies use autodialed and/or prerecorded calls to provide countless customer communications including, but not limited to, providing legally-required alerts about data security breaches, fraud alerts, notices of flight schedule changes, delivery dates for new appliances, notice of school closings or student absenteeism, account balance information, and limited service plans. Companies also use autodialers as a means to comply with a variety of complex national and state telemarketing and debt collection

¹⁰ See *Enhancing Airline Passenger Protections*, Notice of Proposed Rulemaking, 75 Fed. Reg. 32318 (June 8, 2010).

laws and regulations. Autodialers assist companies in complying with calling hour restrictions, limiting call frequency, honoring abandonment rates, and following other regulations.

In addition, all industries have a legitimate business interest in using autodialers and/or prerecorded calls to reach consumers for debt collection, either directly or through a third party. In 2008, the Commission recognized the importance of appropriately balancing the safeguards provided by the TCPA with the relative importance debt collection calls have to the economy.¹¹ Comprehensive protection of consumers against abusive use of autodialers and prerecorded call technologies is provided through the existing prior express consent requirement, and the longstanding Fair Debt Collection Practices Act. Placing the additional burden of obtaining a *written* consent upon industry would effectively result in no weight being given to the importance of collection calls.

There are countless other examples of valuable customer communications for which small and large businesses alike depend on the efficiency and accuracy provided by autodialer and prerecorded message technologies. Attached is a list that enumerates two dozen of these purposes; there are many additional uses not listed in the attachment. In fact, the legitimate business practices that would be effectively halted by the proposed revision are so many and varied that enumerating each current and emerging use and carving out such uses is not feasible. Moreover, as technology evolves, additional consumer benefits of these technologies continue to emerge. For instance, companies are

¹¹ *Declaratory Ruling in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 on the Request of ACA International for Clarification and Declaratory Ruling* at para. 10, CG Docket No. 02-278 (January 4, 2008).

beginning to use prerecorded messages and text messages to wireless devices in response to the Commission's call to provide consumers with real-time information on digital energy consumption. Other innovative uses can be expected to develop in the future. It is not feasible to offer consumers the level of communication that they have come to expect, and that is in certain cases legally required, without the use of these technologies. Requiring *written* consent to provide these communications will prevent these communications from being made.

4. As the Commission has previously recognized, a consumer who provides a telephone number to a business is already aware that the business may use that number to contact the consumer, and thus consents to such contact.¹² In general, consumers that enter a relationship or transaction with a business reasonably expect and intend for the business to contact them using the information provided, as appropriate. Among the comments received from consumers to the NPRM, none demonstrated a pervasive problem with receiving autodialed or prerecorded messages. Based on the industry's extensive knowledge of its consumers, the absence of complaint on this issue is attributable to consumers' expectation and desire that businesses contact them at a phone number provided by the consumer, whether or not that number is wireless.

Conclusion

The Commission should not adopt any rule that obstructs companies from communicating with consumers to provide legitimate and valued services. Thus, the

¹² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752, 8769 at ¶ 31 (1992) (“[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”).

Commission should not extend a requirement that a company obtain the prior *written* consent of consumers to make non-marketing calls to wireless devices and instead should reaffirm its longstanding position that “prior express consent” is sufficient to make these calls.

Respectfully submitted,

ACA International
Air Transport Association
Alliance of Nonprofit Mailers
Coalition of Higher Education Assistance Organizations
DBA International
Direct Marketing Association
Edison Electric Institute
Education Finance Council
Magazine Publishers of America
Mortgage Bankers Association
National Association of College and University Business Officers
National Association of Retail Collection Attorneys
National Association of Student Financial Aid Administrators
National Business Coalition on E-Commerce & Privacy
National Council of Higher Education Loan Programs, Inc.
National Retail Federation
Newspaper Association of America
Student Loan Servicing Alliance
Student Loan Servicing Alliance Private Loan Committee
U.S. Chamber of Commerce

Sincerely,

/s/
Stuart Ingis
Venable LLP

cc: Mark Stone
Colleen Heitkamp
Julie Saulnier

June 21, 2010

ATTACHMENT 1

Business Uses of Prerecorded and Autodialer Technologies

The following list illustrates the nature and types of calls (both voice and text) that could be impacted by the proposed rule change.

1. **Deliver legally required notifications.** Businesses use these technologies to deliver notifications required by law. Notification via delivery of a prerecorded message or autodialed number is an efficient and rapid means for providing this notice, enabling consumers to act quickly to protect themselves from account compromise or identity theft. For instance:
 - a. The majority of states require an entity to provide notification of a breach of security to residents whose data is implicated, and many states permit notice by telephone.
 - b. Section 501(b) of the Gramm-Leach-Bliley Act requires financial institutions to establish customer notification programs following any event in which unauthorized access to customer information occurs.
 - c. Banks use autodialed and prerecorded calls to cell phones to contact customers about address discrepancies as required by the identity theft “red flag” requirements of the Fair Credit Reporting Act.
 - d. Many banks use autodialed and prerecorded calls to cell phones to conduct required non-documentary, independent verification of identity as required by the USA PATRIOT Act.

- 2. Provide debt reminders and other information.** All industries including retail, finance, utilities, and also state and federal governments rely on these technologies to contact consumers to provide debt-related information. For instance, businesses provide consumers with pre-debt notification and other reminders to assist consumers with repayment so they can avoid falling into arrears. Banks use text messages and autodialed or prerecorded calls to cell phones to contact consumers with overdue payments in order to provide notices and offer convenient ways to make a payment. These proactive efforts help prevent the need for consumers to use debt settlement arrangements and other debt counseling services. For those debts that do fall into arrears, businesses, either on their own or through a third party, use these technologies to assist in collection. Debt collection is vital to the sustainability and health of our markets.
- 3. Foster compliance with Federal and State laws.** The use of autodialers helps ensure compliance with the Telephone Consumer Protection Act and the FCC's rules implementing this law. Autodialers reduce incorrect dialing caused by human error, and this technology can be programmed to make calls only during hours permitted by law. Autodialers can also be programmed with pop-up screens that mandate the reading of required disclosures or requests for documentation before a customer service representative can move

forward. Autodialer technology also eliminates dialing errors that may result in the inadvertent disclosure of information to a third party.

- 4. Provide fraud alerts.** Companies use autodialers and/or prerecorded messages to alert consumers of suspicious or unauthorized activity that occurs with respect to their financial accounts. For instance, a company may alert a customer that the customer's credit card has recently been used in a transaction overseas. These alerts provide consumers with real-time notification to help consumers manage their finances, safeguard against identity theft and other unscrupulous acts, or quickly restore accounts when there is no reason for concern.
- 5. Provide mortgage modification services.** In effort to reduce foreclosures and consistent with Obama Administration goals, financial institutions are reaching out to their customers to offer mortgage modification services. Given the volume of calls, these institutions must rely on autodialers and prerecorded messages. The calls required to complete a mortgage modification routinely include reminding borrowers to return the paperwork to qualify for a modification, to make follow-up calls needed to complete the modification, and finally to notify borrowers that a modification offer is being delivered so that the borrower will accept the package. Financial institutions may also notify borrowers about homeowner preservation events or workshops in their communities.

Institutions also use these technologies to fulfill their obligations under federal law. In March 2010, the Treasury Department issued Supplement Directive 10-02 (“SD 10-02”) as guidance for the federal Home Affordable Modification Program (“HAMP”). The purpose of this program is to apply a uniform loan modification process to provide eligible borrowers with sustainable monthly payments for their first lien mortgage loans. As part of the program, companies must solicit certain borrowers to participate in the HAMP. To carry out this obligation, SD 10-02 instructs businesses to make a minimum of four telephone calls in 30 days to the last known phone numbers of record, at different times of the day. These companies cannot be effective carrying out this obligation without the use of autodialers and prerecorded messages.

- 6. Provide loan modification services.** Given the financial climate, businesses are proactively working with consumers to modify other types of loans to assist consumers in repaying amounts owed. Given the volume of calls, these institutions must rely on autodialers and prerecorded messages.

- 7. Save customers money and provide account balance information.**
Companies regularly provide account balance information by text or artificial message to their customers. For instance, financial institutions provide notice concerning overdrafts, fees, balances, transfers, withdrawals, over-limit transactions, past-due accounts, and deposits. In addition, autodialed and/or

prerecorded calls are placed to customers who have applied for secured cards to remind them to fund the card; accounts that are not funded within 90 days are closed. This information helps consumers control personal expenditures, make purchasing decisions, and protect against fraud.

- 8. Provide information related to the provision of goods or services received as a result of the opening of a service relationship or as part of an ongoing relationship with a business.** Businesses use autodialers and/or prerecorded calls to inform customers of important information such as: (1) delivery dates (*e.g.*, furniture or appliances), (2) installation or repair appointments (*e.g.*, carpet cleaning or appliance repair), and (3) change in a flight schedule. Given the volume of calls, businesses must rely on these technologies to notify consumers efficiently and in a timely manner. Consumers prefer to receive such information through multiple channels because it helps ensure they are notified so that they may manage their schedules.
- 9. Report service interruptions or outages.** Companies use autodialed and prerecorded calls to notify customers of service interruptions or outages. The use of these technologies allows a company to rapidly notify affected residents and reduce the volume of in-bound calls.

- 10. Deliver product recall information.** Businesses use autodialers and prerecorded calls to inform consumers rapidly of relevant product recalls and related information
- 11. Notify consumers of prescription fulfillment.** Pharmacies use autodialers and prerecorded calls to notify consumers when their medical prescription order has been filled or provide a reminder to refill a prescription. The use of these technologies helps consumers manage their health care needs and expenses.
- 12. Fraud prevention with respect to credit card use.** Companies use autodialers and/or prerecorded calls to send reminders to customers that a credit card they have requested has been mailed and must be activated. These calls will help prevent fraud and identify address errors.
- 13. Notify consumers of remaining services in a prepaid account.** Consumers receive alerts concerning the amount of services remaining in their account or for a set time period. For instance, users of prepaid wireless services can receive an alert notifying them of the amount of services remaining in their account. These alerts help consumers manage their services.
- 14. Deliver Smart Grid information services.** The FCC has called on industry to provide consumers access to, and control of, their own digital energy

information, including real-time information from smart meters and historical consumption, price and bill data. Consumers use this information to control their costs by managing their consumption of resources. The use of autodialer technologies is vital to delivering these innovative and emerging services to consumers.

- 15. Transmit billing statements.** Many customers prefer to receive billing information at their mobile devices because they find this mode of delivery a convenient way to stay informed. Consumers may receive billing statements, monthly bills, bill reminders, and fraud alerts through their mobile devices.
- 16. Inform customers of changes in terms or features of accounts or services.** Businesses alert customers of changes in terms or features of an account or services, often directing customers to review account information or visit the company web site to learn more. These technologies provide businesses with an efficient means of alerting customers of important and relevant changes to services.
- 17. Foster small business growth.** Small businesses use autodialed and prerecorded calls to communicate with consumers. These technologies are affordable tools that enable small businesses to flourish and compete where costs would otherwise hinder their entry into the market.

- 18. Communicate with employees.** Employers use these technologies to provide their employees with relevant information such as an office closing due to inclement weather or to provide benefit information. During crisis, autodialers and prerecorded messages are used to reach first responders, disaster recovery teams, and provide information to employees.
- 19. Provide insurance information.** Following natural disasters, insurance companies use autodialers and prerecorded calls to notify residents that their insurance coverage may have been triggered by events (*i.e.*, tornadoes and hurricanes) in the region. The use of these technologies is critical in notifying residents in regions affected by natural disasters, and the use of multiple technologies is helpful because communication avenues are frequently affected by natural disasters.
- 20. Notify residents of relevant community-related information.** Communities rely on these technologies to deliver time-sensitive information related to the events in a community, safety messages, school closings, and lock-downs, or to notify parents of their child's tardiness or absenteeism.
- 21. Deliver goods or services.** Consumers receive goods, services, or information they have requested, including product updates or upgrades, which the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with a business.

- 22. Negotiate transactions.** The use of mobile technologies has greatly facilitated the ease and efficiency of negotiating transactions. For instance, companies use autodialers and prerecorded calls to notify consumers that their submitted applications are missing information (*i.e.*, document or signature) or to verify information provided on an application. These technologies help ensure applications are properly processed.
- 23. Provide information pursuant to the terms and conditions of an agreement.** Some businesses are permitted to make prerecorded or artificial calls to customers pursuant to an agreement. For instance, many loan agreements include a provision that indicates a company may use autodialers and prerecorded calls to contact the borrower. Businesses rely on these agreements to contact consumers.
- 24. Resolve customer-initiated service calls.** If a customer contacts a company to make a service inquiry that cannot be resolved quickly, a customer service representative may complete any necessary research and then place an autodialed follow-up call to the consumer.

* * *